

**ASSEMBLY BILL**

**No. 475**

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**Introduced by Assembly Member Emmerson**

February 20, 2007

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An act to amend Section 851.8 of the Penal Code, relating to criminal procedure.

LEGISLATIVE COUNSEL'S DIGEST

AB 475, as introduced, Emmerson. Criminal procedure: motions.

Existing law requires a person seeking to have a court order the record of his or her arrest destroyed to serve a copy of the petition on the prosecuting attorney of the county or city having jurisdiction over the offense.

This bill would require the petitioner to also serve a copy of the petition on the law enforcement agency having jurisdiction over the offense and would allow the law enforcement agency to present evidence at the motion through the district attorney.

Vote: majority. Appropriation: no. Fiscal committee: yes.  
State-mandated local program: no.

*The people of the State of California do enact as follows:*

- 1 SECTION 1. Section 851.8 of the Penal Code is amended to
- 2 read:
- 3 851.8. (a) In any case where a person has been arrested and
- 4 no accusatory pleading has been filed, the person arrested may
- 5 petition the law enforcement agency having jurisdiction over the
- 6 offense to destroy its records of the arrest. A copy of ~~such~~ *the*
- 7 petition shall be served upon the prosecuting attorney of the county

1 or city having jurisdiction over the offense. The law enforcement  
2 agency having jurisdiction over the offense, upon a determination  
3 that the person arrested is factually innocent, shall, with the  
4 concurrence of the prosecuting attorney, seal its arrest records,  
5 and the petition for relief under this section for three years from  
6 the date of the arrest and thereafter destroy its arrest records and  
7 the petition. The law enforcement agency having jurisdiction over  
8 the offense shall notify the Department of Justice, and any law  
9 enforcement agency—~~which~~ *that* arrested the petitioner or  
10 participated in the arrest of the petitioner for an offense for which  
11 the petitioner has been found factually innocent under this  
12 subdivision, of the sealing of the arrest records and the reason  
13 therefor. The Department of Justice and any law enforcement  
14 agency so notified shall forthwith seal their records of the arrest  
15 and the notice of sealing for three years from the date of the arrest,  
16 and thereafter destroy their records of the arrest and the notice of  
17 sealing. The law enforcement agency having jurisdiction over the  
18 offense and the Department of Justice shall request the destruction  
19 of any records of the arrest which they have given to any local,  
20 state, or federal agency or to any other person or entity. Each ~~such~~  
21 agency, person, or entity within the State of California receiving  
22 ~~such a~~ *the* request shall destroy its records of the arrest and ~~such~~  
23 *the* request, unless otherwise provided in this section.

24 (b) If, after receipt by both the law enforcement agency and the  
25 prosecuting attorney of a petition for relief under subdivision (a),  
26 the law enforcement agency and prosecuting attorney do not  
27 respond to the petition by accepting or denying ~~such the~~ petition  
28 within 60 days after the running of the relevant statute of  
29 limitations or within 60 days after receipt of the petition in cases  
30 where the statute of limitations has previously lapsed, then the  
31 petition shall be deemed to be denied. In any case where the  
32 petition of an arrestee to the law enforcement agency to have an  
33 arrest record destroyed is denied, petition may be made to the  
34 superior court—~~which~~ *that* would have had territorial jurisdiction  
35 over the matter. A copy of ~~such the~~ petition shall be served on the  
36 *law enforcement agency and the* prosecuting attorney of the county  
37 or city having jurisdiction over the offense at least 10 days prior  
38 to the hearing thereon. The prosecuting attorney *and the law*  
39 *enforcement agency through the district attorney* may present  
40 evidence to the court at ~~such the~~ hearing. Notwithstanding Section

1 1538.5 or 1539, any judicial determination of factual innocence  
2 made pursuant to this section may be heard and determined upon  
3 declarations, affidavits, police reports, or any other evidence  
4 submitted by the parties which is material, relevant and reliable.  
5 A finding of factual innocence and an order for the sealing and  
6 destruction of records pursuant to this section shall not be made  
7 unless the court finds that no reasonable cause exists to believe  
8 that the arrestee committed the offense for which the arrest was  
9 made. In any court hearing to determine the factual innocence of  
10 a party, the initial burden of proof shall rest with the petitioner to  
11 show that no reasonable cause exists to believe that the arrestee  
12 committed the offense for which the arrest was made. If the court  
13 finds that this showing of no reasonable cause has been made by  
14 the petitioner, then the burden of proof shall shift to the respondent  
15 to show that a reasonable cause exists to believe that the petitioner  
16 committed the offense for which the arrest was made. If the court  
17 finds the arrestee to be factually innocent of the charges for which  
18 the arrest was made, then the court shall order the law enforcement  
19 agency having jurisdiction over the offense, the Department of  
20 Justice, and any law enforcement agency which arrested the  
21 petitioner or participated in the arrest of the petitioner for an offense  
22 for which the petitioner has been found factually innocent under  
23 this section to seal their records of the arrest and the court order  
24 to seal and destroy ~~such~~ *the* records, for three years from the date  
25 of the arrest and thereafter to destroy their records of the arrest  
26 and the court order to seal and destroy such records. The court  
27 shall also order the law enforcement agency having jurisdiction  
28 over the offense and the Department of Justice to request the  
29 destruction of any records of the arrest which they have given to  
30 any local, state, or federal agency, person or entity. Each state or  
31 local agency, person or entity within the State of California  
32 receiving such a request shall destroy its records of the arrest and  
33 the request to destroy ~~such~~ *the* records, unless otherwise provided  
34 in this section. The court shall give to the petitioner a copy of any  
35 court order concerning the destruction of the arrest records.

36 (c) In any case where a person has been arrested, and an  
37 accusatory pleading has been filed, but where no conviction has  
38 occurred, the defendant may, at any time after dismissal of the  
39 action, petition the court ~~which~~ *that* dismissed the action for a  
40 finding that the defendant is factually innocent of the charges for

1 which the arrest was made. A copy of ~~such~~ *the* petition shall be  
2 served on the prosecuting attorney of the county or city in which  
3 the accusatory pleading was filed at least 10 days prior to the  
4 hearing on the petitioner's factual innocence. The prosecuting  
5 attorney may present evidence to the court at ~~such~~ *the* hearing.  
6 ~~Such~~ *The* hearing shall be conducted as provided in subdivision  
7 (b). If the court finds the petitioner to be factually innocent of the  
8 charges for which the arrest was made, then the court shall grant  
9 the relief as provided in subdivision (b).

10 (d) In any case where a person has been arrested and an  
11 accusatory pleading has been filed, but where no conviction has  
12 occurred, the court may, with the concurrence of the prosecuting  
13 attorney, grant the relief provided in subdivision (b) at the time of  
14 the dismissal of the accusatory pleading.

15 (e) Whenever any person is acquitted of a charge and it appears  
16 to the judge presiding at the trial ~~wherein such~~ *at which the*  
17 acquittal occurred that the defendant was factually innocent of  
18 ~~such~~ *the* charge, the judge may grant the relief provided in  
19 subdivision (b).

20 (f) In any case where a person who has been arrested is granted  
21 relief pursuant to subdivision (a) or (b), the law enforcement agency  
22 having jurisdiction over the offense or court shall issue a written  
23 declaration to the arrestee stating that it is the determination of the  
24 law enforcement agency having jurisdiction over the offense or  
25 court that the arrestee is factually innocent of the charges for which  
26 the person was arrested and that the arrestee is thereby exonerated.  
27 Thereafter, the arrest shall be deemed not to have occurred and  
28 the person may answer accordingly any question relating to its  
29 occurrence.

30 (g) The Department of Justice shall furnish forms to be utilized  
31 by persons applying for the destruction of their arrest records and  
32 for the written declaration that one person was found factually  
33 innocent under subdivisions (a) and (b).

34 (h) Documentation of arrest records destroyed pursuant to  
35 subdivision (a), (b), (c), (d), or (e) ~~which~~ *that* are contained in  
36 investigative police reports shall bear the notation "Exonerated"  
37 whenever reference is made to the arrestee. The arrestee shall be  
38 notified in writing by the law enforcement agency having  
39 jurisdiction over the offense of the sealing and destruction of the  
40 arrest records pursuant to this section.

1 (i) Any finding that an arrestee is factually innocent pursuant  
2 to subdivision (a), (b), (c), (d), or (e) shall not be admissible as  
3 evidence in any action.

4 (j) Destruction of records of arrest pursuant to subdivision (a),  
5 (b), (c), (d), or (e) shall be accomplished by permanent obliteration  
6 of all entries or notations upon ~~such~~ *the* records pertaining to the  
7 arrest, and the record shall be prepared again so that it appears that  
8 the arrest never occurred. However, where (1) the only entries on  
9 the record pertain to the arrest and (2) the record can be destroyed  
10 without necessarily ~~effecting~~ *affecting* the destruction of other  
11 records, then the document constituting the record shall be  
12 physically destroyed.

13 (k) No records shall be destroyed pursuant to subdivision (a),  
14 (b), (c), (d), or (e) if the arrestee or a codefendant has filed a civil  
15 action against the peace officers or law enforcement jurisdiction  
16 which made the arrest or instituted the prosecution and if the  
17 agency which is the custodian of ~~such~~ *the* records has received a  
18 certified copy of the complaint in ~~such~~ *the* civil action, until the  
19 civil action has been resolved. Any records sealed pursuant to this  
20 section by the court in the civil actions, upon a showing of good  
21 cause, may be opened and submitted into evidence. The records  
22 shall be confidential and shall be available for inspection only by  
23 the court, jury, parties, counsel for the parties and any other person  
24 authorized by the court. Immediately following the final resolution  
25 of the civil action, records subject to subdivision (a), (b), (c), (d),  
26 or (e) shall be sealed and destroyed pursuant to subdivision (a),  
27 (b), (c), (d), or (e).

28 (l) For arrests occurring on or after January 1, 1981, and for  
29 accusatory pleadings filed on or after January 1, 1981, petitions  
30 for relief under this section may be filed up to two years from the  
31 date of the arrest or filing of the accusatory pleading, whichever  
32 is later. Until January 1, 1983, petitioners can file for relief under  
33 this section for arrests which occurred or accusatory pleadings  
34 which were filed up to five years prior to the effective date of the  
35 statute. Any time restrictions on filing for relief under this section  
36 may be waived upon a showing of good cause by the petitioner  
37 and in the absence of prejudice.

38 (m) Any relief which is available to a petitioner under this  
39 section for an arrest shall also be available for an arrest which has

1 been deemed to be or described as a detention under Section 849.5  
2 or 851.6.

3 ~~(n) The provisions of this~~ *This* section shall not apply to any  
4 offense which is classified as an infraction.

5 ~~(o) (1) The provisions of this~~ *This* section shall be repealed on  
6 the effective date of a final judgment based on a claim under the  
7 California or United States Constitution holding that evidence  
8 ~~which~~ *that* is relevant, reliable, and material may not be considered  
9 for purposes of a judicial determination of factual innocence under  
10 this section. For purposes of this subdivision, a judgment by the  
11 appellate division of a superior court is a final judgment if it is  
12 published and if it is not reviewed on appeal by a court of appeal.  
13 A judgment of a court of appeal is a final judgment if it is published  
14 and if it is not reviewed by the California Supreme Court.

15 ~~(2) Any such~~ decision referred to in this subdivision shall be  
16 stayed pending appeal.

17 (3) If not otherwise appealed by a party to the action, any  
18 decision referred to in this subdivision which is a judgment by the  
19 appellate division of the superior court shall be appealed by the  
20 Attorney General.

21 (p) A judgment of the court under subdivision (b), (c), (d), or  
22 (e) is subject to the following appeal path:

23 (1) In a felony case, appeal is to the court of appeal.

24 (2) In a misdemeanor case, or in a case in which no accusatory  
25 pleading was filed, appeal is to the appellate division of the superior  
26 court.